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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JUAN CALDERA RODRIGUEZ, Defendant and Appellant.	B210644 (Los Angeles County Super. Ct. No. BA320700)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Affirmed in part; reversed in part and remanded.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Juan Caldera Rodriguez appeals from the judgment entered following his conviction by a jury of three counts of possessing methamphetamine for sale, two counts of selling or transporting methamphetamine, one count of possessing cocaine for sale, and one count of selling or transporting cocaine. (Health & Saf. Code, §§ 11378, 11379, subd. (a), 11351, 11352, subd. (a).)[1] The jury also found that the three counts of possessing methamphetamine for sale took place upon the grounds of, or within 1,000 feet of, a public junior high school within the meaning of section 11353.6, subdivision (b). Defendant contends the evidence is insufficient to sustain one of the convictions for possessing methamphetamine for sale (count 3) and the true findings on the section 11353.6, subdivision (b) allegations. We reverse his conviction as to count three, affirm the judgment in all other respects, and remand the matter for resentencing.

STATEMENT OF FACTS

With the use of a confidential informant, the Long Beach Police Department began an investigation into narcotic sales occurring near Washington Middle School, located at 1450 Cedar Avenue in the City of Long Beach. The informant was used to conduct undercover purchases of drugs from suspected sellers. In this case, the informant made a series of phone calls to defendant and arranged to purchase cocaine and methamphetamine. Prior to sending the informant to buy the drugs, the police searched him to ensure he had no money or contraband and gave him the funds necessary to complete the sales.

On March 20, 2007, at the request and in the presence of Detective Jose Serenil, the informant called defendant and arranged the purchase of an eighth of an ounce of cocaine. Defendant told the informant to meet him at defendant's apartment at 1457 Cedar Avenue, which is across the street from Washington Middle School. Detective Serenil drove the informant to the corner of Anaheim and Cedar, a location near the

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[1] All further statutory references are to the Health and Safety Code.

middle school, and dropped him off. As other officers watched, the informant walked northbound on Cedar Avenue. Officer Brian Buchanan saw defendant standing in front of 1457 Cedar Avenue. Officers observed the informant approach defendant and appear to have a brief conversation. After speaking, they walked up the apartment steps and entered apartment B. Less than five minutes later, Buchanan saw the informant leave apartment B and walk down the sidewalk. As Buchanan made his observations, he noted several children in the area of the middle school. The informant returned to Serenil, gave him a bindle containing what appeared to be cocaine, and said he purchased the drug from defendant for $80 after they went inside defendant's apartment. In Serenil's opinion, the cocaine was possessed by defendant for the purpose of sale.

On March 21, 2007, the informant again called defendant in the presence of Detective Serenil. The informant asked to buy one-half ounce of methamphetamine and defendant said the price was $325. Defendant told the informant to meet him in front of the apartment building on Cedar. At approximately 3:15 p.m., Detective Dennis Harter parked in front of the middle school, giving him a direct view of 1457 Cedar Avenue, apartment B. He watched as the informant met with defendant in front of an apartment building next to the 1457 address. Harter saw the men appear to engage in conversation. The informant said defendant asked him to wait there, as defendant had to walk to the corner of Anaheim and Cedar. Harter saw defendant walk southbound out of view while the informant remained.

As Detective Harter waited, a black Honda pulled behind the detective.[2] The car contained a driver and defendant, who was seated in the back seat behind the driver. The driver, Faustino Gutierrez, was also a focus of the narcotics investigation.[3]

Defendant got out of the car and walked across the street to the informant. The men went up the steps of 1457 Cedar Avenue and entered apartment B. The informant

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[2] Another detective saw defendant waiting in a parking lot on the corner of Anaheim and Cedar. A compact car approached and defendant got inside.

[3] During the course of their investigation, police learned where Gutierrez lived.

said that once inside he and defendant completed an exchange of methamphetamine for money. After a couple of minutes, Harter saw defendant and the informant emerge from the apartment. The informant walked away while defendant returned to the black Honda and got in the back seat. As he watched the apartment, Harter saw that "there were numerous kids playing in the playground." There were also children standing at a door of the school building who appeared to be waiting to be picked up.

After leaving defendant, the informant returned to the location where Serenil was waiting and handed him a bindle containing what appeared to be crystal methamphetamine. Serenil believed the drug was possessed by defendant for the purpose of sale.

On April 2, 2007, in Detective Serenil's presence, the informant placed a third call to defendant and again arranged for the purchase of a half-ounce of methamphetamine. Defendant stated the price was $350. The informant was told to wait in front of the apartment building on Cedar. At approximately 3:00 p.m., Officer Buchanan parked directly across the street from defendant's apartment building and watched as defendant left his residence. He walked south on Cedar and out of view. The officer saw the informant walk down Cedar and stop in front of defendant's building.

After dropping off the informant, Detective Serenil drove to the corner of Anaheim and Cedar. He saw a black Honda being driven by Gutierrez pull into the parking lot and defendant get into the back seat of the vehicle. The car left Serenil's view. After about 15 seconds, another officer informed him via radio that defendant had gotten out of the Honda.

As Buchanan waited in front of defendant's apartment, he observed the black Honda approach, pull directly in front of his car, and park. Defendant got out of the Honda and walked up to the informant. They went upstairs and into defendant's apartment. Less than five minutes later, the informant exited the apartment and walked out of view. During the time Buchanan made his observations, he saw school children and parents coming and going from the middle school. The informant returned to

Serenil's location and gave him a bindle containing what appeared to be crystal methamphetamine in an amount that was possessed for the purpose of sale.

On April 4, 2007, the informant called defendant and arranged to buy four ounces of methamphetamine. Defendant said the cost was $2,800 and told the informant to wait. The informant called defendant a second time and asked how long it would be before defendant had the drugs. Defendant replied that it would not be long, as the person who was providing defendant the drugs had just finished cutting them.

That same day, Detective Harter was informed that the informant had arranged to purchase methamphetamine from defendant. Police planned to arrest defendant and Gutierrez when they met and execute search warrants at their homes. Harter's assignment was to watch Gutierrez's residence. He saw Gutierrez arrive at his house driving the Honda that Harter had seen on March 21. Gutierrez got out of the car carrying two stainless steel pots, the type commonly used to manufacture methamphetamine, and entered the home. About two minutes later, Gutierrez came out of the house and drove away in the Honda, which was followed by other officers.

Detective Serenil drove to the northwest corner of Anaheim and Cedar. He saw the Honda enter the parking lot and defendant get into the back seat. Serenil directed Detective Ernest Armond and other officers to stop the Honda before it got out of the parking lot. When the vehicle was stopped, Gutierrez was driving, his son was in the right front passenger seat, and defendant was in the back seat. Armond directed Gutierrez to get out of the car, and as he did so, Armond saw a Ziploc baggie containing a crystal-like substance in Gutierrez's right front pants pocket. While patting Gutierrez down, Armond found three smaller plastic bindles containing the same type of crystal-like substance in Gutierrez's left shirt pocket.

The detective searched the Honda. Behind the panel on the driver's door, he found additional bindles of crystal-like substance, which were individually packaged and inside a larger plastic baggie. A $100 bill was located on the center console.

Defendant was searched in the booking area of the Long Beach Police Department and $747 was found on his person. He did not possess any narcotics. Defendant's apartment was searched and no contraband was located.

Two chemists testified and the following was established: (1) the substance purchased on March 20 was cocaine salt; (2) the substance purchased on March 21 was methamphetamine; (3) the substance purchased on April 2 was methamphetamine; and (4) the substance seized from the vehicle and Faustino Gutierrez on April 4 was methamphetamine.

Defendant stated he saw the informant for the first time when the latter testified in court, and denied ever speaking to him on the telephone. He claimed he got into Gutierrez's Honda on April 4 because Gutierrez was going to give him a ride to the bank.

DISCUSSION

I. Sufficiency of the Evidence With Respect to the April 4 Offense

The jury found defendant guilty of possessing methamphetamine for sale on April 4, the day he and Faustino Gutierrez were stopped by police as they sat in Gutierrez's Honda. Defendant contends the evidence failed to establish that he possessed the methamphetamine found in the Honda or on Gutierrez's person. He argues his mere presence in the vehicle is insufficient to support his conviction.

"On appeal, we uphold the jury's verdict if there was substantial evidence to support it. [Citation.] Considering the entire record, we determine whether there is evidence that is '"reasonable in nature, credible, and of solid value"' from which a '"reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt."' [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 186-187.) "We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be

reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Neither party suggests the jury was not properly instructed with respect to the element of possession. In that regard, in accordance with CALJIC No. 12.01, the jury was told:

"There are two kinds of possession: actual possession and constructive possession.

"'Actual possession' requires that a person knowingly exercise direct physical control over a thing.

"'Constructive possession' does not require actual possession but does require that a person knowingly exercise control over or right to control a thing, either directly or through another person or persons.

"One person may have possession alone, or two or more persons together may share actual or constructive possession."

The Attorney General argues "there was substantial evidence upon which the jury could have based its determination that appellant had constructive possession of methamphetamine on April 4, 2007." He cites the informant's call to defendant to arrange the purchase, defendant's statement that it would not take long to obtain the methamphetamine because the person from whom he was getting the drug had just finished cutting it, and defendant's meeting with Gutierrez, the same supplier defendant had utilized on prior occasions. He contends "[t]he jury could infer that [defendant], either individually, or through his agent, Gutierrez, exercised the right to control the methamphetamine in the car."

In support of his contention, the Attorney General cites *People v. White* (1958) 50 Cal.2d 428. In that case, the defendant left money with his roommate for the purpose of purchasing heroin. When the police arrived at the defendant's apartment, they found the heroin in the roommate's bedroom. (*Id*. at p. 430.) In rejecting the defendant's claim that there was no evidence he had possession of the drug, the court concluded, "Conover

[the roommate] purchased the heroin as agent for appellant and pursuant to his express instructions, and appellant, as the owner of the capsule, was entitled to exercise dominion and control over it. He had constructive possession as soon as the narcotic was acquired for him, and it is immaterial whether he had personal knowledge of the presence of the narcotic in the apartment." (*Id*. at p. 431.)

Defendant argues *White* is distinguishable. He claims there is no evidence that he and Gutierrez had consummated a sale for the four ounces of methamphetamine defendant had agreed to sell to the informant. Because the police stopped the vehicle before he had a chance to purchase the drugs, defendant urges he "did not yet have a right to exercise dominion and control over any of the methamphetamine on Gutierrez's person or in his vehicle." We agree.

The prosecution's theory was that defendant was purchasing drugs from Gutierrez, a higher level dealer, and selling them to the informant. It did not claim that Gutierrez and defendant were partners in a drug selling enterprise. In order to explain how defendant could have purchased $2,800 worth of methamphetamine when he had only $747 at the time of his arrest, the prosecution's expert testified it was likely Gutierrez had extended defendant credit. Defendant correctly points out that "[e]ven assuming arguendo the jury could have reasonably inferred from the evidence that a deal had been negotiated ahead of time and appellant was about to be delivered the methamphetamine, a verbal agreement or contract to purchase drugs is insufficient to establish constructive possession."

In *Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, the defendant and an undercover officer agreed to a deal whereby the defendant would trade his stamp collection for a pound of methamphetamine. When they met to make the exchange, the defendant put his stamps in the back of the officer's car and the officer removed the methamphetamine. Just as the officer was about to hand the drugs to the defendant, other officers moved in and arrested the defendant. (*Id*. at pp. 537-538.)

The court rejected "the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession." (*Id*. at p. 539.) It concluded "that in

the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." (*Id*. at p. 540, fn. omitted.) The court held that although the defendant "exercised some control over the physical setting in which the sale was to take place," "initiated the sale process of the drugs," paid for the drugs, and "was prepared to take immediate physical possession of the drugs," these actions did not establish that he exercised control over the contraband itself. (*Ibid*.)

People v. Barnes (1997) 57 Cal.App.4th 552 also supports defendant's contention. There, the defendant claimed he had purchased cocaine from a street dealer. When he tried to smoke the drug, he determined the rocks were "bunk," fake cocaine. He went back to the dealer in an attempt to get either real cocaine or his money back. As the defendant was speaking to the dealer, the police pulled up, the seller threw a vial of cocaine, which hit the defendant in the chest, and ran. (*Id*. at p. 555.) The court held this evidence was insufficient to establish constructive possession, as the defendant could not "be said to have 'knowingly exercise[d] . . . the right to control' an object he only glimpsed in flight and made no attempt to possess or touch." (*Id*. at p. 557.)

"*Barnes* and *Armstrong*, thus, stand for the proposition that the mere fact that a defendant has induced someone else, either by payment or out of good will, to attempt to deliver a controlled substance into his possession does not itself constitute evidence of possession of that substance. Rather, possession must be established by other evidence that the defendant, as opposed to the person who actually possessed the drugs, was in 'exclusive control' of, or exercised or had the 'right to exercise dominion or control' over, the illicit substance. [Citation.]" (*In re Rothwell* (2008) 164 Cal.App.4th 160, 171.)

The Attorney General claims defendant's history of meeting with Gutierrez and obtaining the drugs that were ultimately sold to the informant establishes that defendant had a right to control the methamphetamine found in the car. He suggests it is significant that the drugs in the car weighed nearly the same amount (four ounces) that defendant

had agreed to sell to the informant. As we have pointed out, however, the prosecution's theory was that defendant was buying the methamphetamine from Gutierrez, and there is no evidence that at the time the police stopped the car defendant had acquired any right to control the drugs that were located behind the driver's door panel of Gutierrez's car. We are left to speculate as to the stage of their negotiations, and conjecture does not constitute substantial evidence. (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) At best, the prosecution established that defendant conspired with Gutierrez to sell narcotics; this alone is not evidence that he possessed or had the right to control the methamphetamine at issue. (See *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419-1420 [conspiracy to traffic in cocaine did not support conclusion that the defendant had constructive possession of the money his coconspirator brought to the location of the sale].)

Defendant's conviction for possessing methamphetamine for sale on April 4 (count 3) must be reversed.

II. The Special Allegation

The jury found the enhancement pursuant to section 11353.6, subdivision (b) to be true with respect to the March 21, April 2, and April 4 offenses.[4]

The subdivision provides: "Any person 18 years of age or over who is convicted of [possessing methamphetamine for sale], where the violation takes place upon the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility where the offense occurs, shall receive an additional punishment of 3, 4, or 5 years at the court's discretion."

In his opening brief, defendant claimed the record fails to establish Washington Middle School was in session or that children were on campus when the crimes were

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[4] Given our reversal of count three, we need not discuss the enhancement attached to that count.

committed and that the crimes were committed in a public place.[5] In his reply brief, he conceded there was evidence that children were on campus when the March 21 offense was committed. However, he argued the enhancement required a showing that he possessed the drug at a facility where minors were present and such evidence was not presented.

With respect to the March 21 incident, as defendant acknowledged, there is sufficient evidence to support the jury's conclusion that children were playing on school grounds at the time defendant and the informant interacted on the street before going to defendant's apartment to consummate the sale.

Contrary to defendant's claim, we also find there is sufficient evidence showing that children were present within the meaning of the statute when the offense occurred on April 2. At the time he saw defendant walking out of his apartment (defendant eventually met with Gutierrez at the parking lot on the next block), Officer Buchanan observed children and parents "coming and going from the school." He testified that when defendant returned in Gutierrez's car and went to his apartment with the informant, children were still present.

Defendant argues "[t]he [officer's] generic evidence that children are still around later when [defendant] exits Gutierrez's vehicle and goes into his apartment with the police informant is insufficient to find that school was still in session or that minors were using the school where the offense occurred." We are not persuaded.

With respect to the time when defendant returned to his apartment, the prosecutor asked the officer, "You told us that — earlier that there were school children around when Mr. Rodriguez first left his apartment. Were there still children around?" To this, Buchanan answered, "Yes." From the manner in which the question was asked, the trier of fact could reasonably infer that when defendant returned to his apartment the children

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[5] Section 11353.6, subdivision (g) requires that an offense which occurs off school premises must take place in a "public area or business establishment where minors are legally permitted to conduct business which is located within 1,000 feet" of any school.

were engaged in the same activity the officer had observed earlier when defendant left the apartment. They were still "coming and going from the school." Where, as here, the circumstances justify the inference drawn by the jury, reversal is not required because a contrary conclusion could be reached. (*People v. Lindberg, supra,* 45 Cal.4th at p. 27.) Sufficient evidence established that minors were on school grounds at the time defendant possessed the methamphetamine.

We also reject defendant's assertion that the prosecution failed to establish he possessed the narcotics in a public place. Although the sale of the drugs occurred in defendant's apartment, there is strong evidence he received the methamphetamine he sold to the informant from Gutierrez. On both occasions, defendant met with Gutierrez and walked on Cedar Avenue with the drugs in his possession before reaching his apartment. In doing so, he was in a public area within 1,000 feet of the school.

Finally, defendant points out there is no evidence the school was open for classes or school-related programs at the time he possessed the drugs. Thus, he urges, his conduct ran afoul of the enhancement only if he possessed the narcotics "at any time when minors are using the facility where the offense occurs." Relying on the dissent in *People v. Townsend* (1998) 62 Cal.App.4th 1390, he argues the prosecution was required to show that he possessed the drugs at a facility where minors were present. In other words, he had to possess the methamphetamine on the school grounds when children were present, not merely within 1,000 feet of the facility.

The majority opinion in *Townsend* recognized the statutory language could be read in that fashion, but determined that it was the Legislature's intent to keep drug traffickers out of areas where children were likely to be present. It concluded there was "no basis either in the statutory language or in the legislative history for inferring that the Legislature intended to retain the phrase 'within 1,000 feet' only during the hours a school is open, and to relinquish that protection when school is closed but students are 'using the facility.' . . . To the extent that the amended portion of subdivision (b) creates ambiguity in its scope, appellant's proposed construction is unreasonable. Consequently, we do not apply the rule invoked by appellant, that ambiguous penal statutes are

construed in favor of defendants. That rule is applicable only when 'two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.' [Citation.] Courts will not favor a defendant's interpretation if it would lead to results 'that are contrary to legislative intent or that fail to prevent the harm that is identified in the statute or that override common sense and create palpable absurdities.' [Citations.]

"In our view, the section 11353.6 enhancement applies whenever students are on campus—whether school is open or closed—and the offense takes place either on campus *or* in a public area within 1,000 feet of the school boundary." (*People v. Townsend, supra*, 62 Cal.App.4th at pp. 1396-1397.) We agree.

DISPOSITION

Defendant's conviction on count 3 is reversed. The judgment is affirmed in all other respects and the matter is remanded for resentencing.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.